

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

FEB -4 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CITIBANK, N.A., as Trustee for the)
certificate holders of Structured Asset)
Mortgage Investments II Inc., Bear)
Stearns Alt-A-Trust, Mortgage Pass-)
Through Certificate Series 2006-4,)

Plaintiff/Appellee,)

v.)

BRICE COLEMAN,)

Defendant/Appellant.)
_____)

2 CA-CV 2010-0113
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201001657

Honorable Craig A. Raymond, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Brice Coleman appeals from the trial court’s judgment in favor of appellee Citibank, N.A., finding him guilty of forcible detainer. On appeal, Coleman argues the judgment should be vacated, and the forcible detainer action dismissed, because he was denied a number of due process protections afforded by the Rules of Procedure for Eviction Actions and because a forcible detainer action was not the “proper forum” to determine Citibank’s rights to the property. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the trial court’s judgment.” *Sw. Soil Remediation, Inc. v. City of Tucson*, 201 Ariz. 438, ¶ 2, 36 P.3d 1208, 1210 (App. 2001). In April 2006, Coleman executed a promissory note secured by a deed of trust on real property located in Pinal County. In April 2010, the trustee, acting under the deed of trust’s power of sale, sold the property to Citibank at a trustee’s sale after Coleman defaulted on his obligations to make payments under the promissory note. Following the sale, a trustee’s deed was issued to Citibank and recorded in the Office of the Pinal County Recorder. Citibank then demanded possession of the property in a written notice to Coleman. When Coleman failed to vacate the property, Citibank filed this forcible detainer action in the Pinal County Superior Court. Citibank served process on Coleman by posting the summons and complaint on the front door of Coleman’s residence and by certified mail delivered to that address.

¶3 At the initial appearance, Coleman, appearing pro se, stated he was “making a special appearance.” He argued the action should be dismissed because

Citibank was “a fictitious plaintiff” and he was “the sole holder and owner of the property.” Coleman then pled not guilty and requested a jury trial, asserting there were issues of material fact, namely that Citibank was not “the real party of interest, or holder in due course” and, therefore, it had no “standing for foreclosure” of Coleman’s property. The trial court found Coleman had “presented no viable legal reason why this matter should be set for a jury trial” and, after a hearing, granted judgment in favor of Citibank. This appeal followed.

Discussion

¶4 Coleman contends he was denied the “due process protections afforded” under the Rules of Procedure for Eviction Actions (“RPEA”) and the forcible detainer statutes. Specifically, he argues: 1) Citibank failed to serve him properly with the summons and complaint; 2) there were serious issues regarding the transfers and assignments leading to and including Citibank’s interest in the property that could not be resolved in a summary forcible detainer action; and 3) the trial court improperly denied his request for a jury trial pursuant to A.R.S. § 12-1176. We consider these issues in turn below. This court reviews a trial court’s interpretation and application of statutes and court rules *de novo*. See *Bilke v. State*, 206 Ariz. 462, ¶ 10, 80 P.3d 269, 271 (2003) (statutes); *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶ 18, 181 P.3d 1126, 1131 (App. 2008) (court rules).

I. Service of Process

¶5 Coleman argues he was denied due process because Citibank failed to serve him properly pursuant to Rule 5(f), RPEA, which requires personal service pursuant to

Rule 4.1, Ariz. R. Civ. P. He contends that, as a result, the court “did not have proper in person[a]m jurisdiction.”

¶6 A trial court’s jurisdiction over a person is established by “the fact of service and the resulting notice.” *Hirsch v. Nat’l Van Lines, Inc.*, 136 Ariz. 304, 308, 666 P.2d 49, 53 (1983). In a forcible detainer action, “[s]ervice of the summons and complaint shall be accomplished . . . as provided by Rule 4.1 or 4.2 of the Arizona Rules of Civil Procedure.” RPEA 5(f). Rule 4.1(d), Ariz. R. Civ. P., authorizes service “by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual’s dwelling house . . . with some person of suitable age and discretion.”

¶7 Coleman contends that, contrary to these rules, “the summons and the pleading were not delivered to [him] personally or by leaving copies at [his] abode with a person of suitable age and discretion,” but rather “were posted on the door and sent by mail.” According to the process server’s affidavit, copies of the summons and complaint were served on Coleman “[b]y posting [on] the door at” Coleman’s residence. The affidavit also stated that copies of the documents were sent by certified mail to Coleman at the same address the following day. The record thus supports Coleman’s contention that Citibank did not serve him in the manner specified under Rule 4.1(d).

¶8 However, pursuant to Rule 5(g), RPEA, “[i]f the defendant appears at the initial appearance, the appearance shall constitute a waiver of any objections to the form or manner of service unless the defendant asserts those grounds at the initial appearance or in a previously filed written answer.” Because Coleman failed to raise any objection

to the “form or manner of service” at or before the initial appearance, his claim is waived. *See Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, ¶ 12, 224 P.3d 988, 991 (App. 2010) (failure to raise affirmative defense of lack of personal jurisdiction waives jurisdictional objection).¹

¶9 Coleman nevertheless argues he did not waive the issue of personal jurisdiction because at the initial appearance he “mentioned twice that he was making a special appearance.”² Coleman offers no authority to support his contention that merely stating he was making a “special appearance” was sufficient to challenge the trial court’s jurisdiction and to preserve the issue for appeal. As noted above, Coleman never objected to the trial court’s exercise of personal jurisdiction over him, much less complained that he had not been served properly. On the contrary, he argued he was “the sole holder and owner of the property,” Citibank was not “the real party of interest, or holder in due course,” and the complaint should be dismissed because Citibank lacked standing to file the action. Moreover, Coleman pled not guilty and requested a jury trial. By “argu[ing] the merits of his . . . position[, Coleman] cannot avoid the consequences of that appearance by resort[ing] to the jargon of ‘special appearance[.]’” *Kline v. Kline*,

¹Coleman also failed to seek relief from the court’s judgment on this ground pursuant to Rule 15, RPEA, which allows the aggrieved party to file “a motion to set aside a judgment” if the party “did not receive proper notice or was not properly served.” RPEA 15(a)(3).

²Coleman also claims the court “had a duty to check the record” to determine the service was proper. Because Coleman does not support this argument with authority, we do not address it further. *See Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (“Issues not clearly raised and argued in a party’s appellate brief are waived.”); *see also* Ariz. R. Civ. App. P. 13(a)(6).

221 Ariz. 564, n.10, 212 P.3d 902, 909 n.10 (App. 2009); *see also Tarr v. Superior Court*, 142 Ariz. 349, 351-52, 690 P.2d 68, 70-71 (1984) (action taken to assert defense of insufficiency of service of process must be limited in scope and narrowly argued); *Ariz. Real Estate Inv., Inc. v. Schrader*, 595 Ariz. Adv. Rep. 20, ¶ 7 (Ct. App. Nov. 9, 2010) (contesting service of process before entering general appearance preserves issue for appeal). Coleman has waived this issue on appeal.

II. Dismissal of the Forcible Detainer Action

¶10 Coleman next argues the forcible detainer action should have been dismissed because “invalid recorded transfers . . . create[d] material issues of fact and [the] potential of competing claims and title issues outside the scope of a forcible detainer action.”³ Among the issues Coleman lists as beyond the scope of a forcible detainer action and requiring dismissal of Citibank’s complaint are the validity and authenticity of documents, whether the Trustee had authority to conduct a sale of the property at a trustee’s sale, and the validity of the transfer of the beneficial interest to Citibank. As best we understand it, Coleman argues that because of these claimed irregularities,

³Coleman also argues Citibank’s action should have been dismissed for failure to plead the claim sufficiently. Specifically, Coleman contends that “prior to adjudicating the right to possession in a forcible detainer action,” Citibank should have pled and proven “the status of holder in due course . . . , establishing the chain of title” under A.R.S. § 47-3302. Within this argument, Coleman further claims Citibank did not bring its forcible detainer action in good faith, as required by Rule 4, RPEA. Coleman contends Citibank “failed to act with due diligence to verify the holder in due course and the validity of the transfers prior to initiating the action.” Coleman did not raise either of these arguments before the trial court. And because we do not review claims raised for the first time on appeal, we do not address these arguments further. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238-39 (App. 2007)..

Citibank's title to the property was invalid and the trial court should have dismissed the forcible detainer action to allow the parties to adjudicate these issues in a different forum.

¶11 A forcible detainer action is a summary proceeding intended to provide a speedy and adequate statutory remedy for obtaining possession of property by one entitled to actual possession. *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 433, 880 P.2d 648, 653 (App. 1993). Thus, the only issue before the trial court is the right of actual possession; the court may not inquire into the merits of title. A.R.S. § 12-1177(A); *Curtis v. Morris (Curtis II)*, 186 Ariz. 534, 534, 925 P.2d 259, 259 (1996) (citing statute).

¶12 Coleman maintains, as he did below, that Citibank was not the real party in interest and did not have standing to bring the action because it could not establish that it was a holder in due course of the note. We disagree. Under A.R.S. § 12-1173.01(A)(2), a person "who retains possession of any land, tenements or other real property after he receives written demand of possession may be removed through an action for forcible detainer . . . [i]f the property has been sold through a trustee's sale under a deed of trust." In this case, Citibank purchased the property at a trustee's sale, and Coleman, despite having received a written demand, failed to vacate the premises. Citibank therefore had standing to bring the forcible detainer action pursuant to § 12-1173.01. And the trustee's deed issued to Citibank raised "the presumption of compliance with the requirements of

the deed of trust and [the statutes] relating to the exercise of the power of sale and the sale of the trust property.”⁴ A.R.S. § 33-811(B).

¶13 Because a forcible detainer action is intended to provide a speedy and adequate statutory remedy for obtaining possession of property, “this objective would be entirely frustrated if the defendant were permitted to . . . interpose customary and usual defenses permissible in the ordinary action at law.” *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 205, 167 P.2d 394, 397 (1946). Moreover, a judgment in a forcible detainer action does not bar subsequent proceedings between the same parties in a quiet title action, because “adjudication of . . . title is not available in [forcible detainer] action[s].” *Morris v. Curtis*, 184 Ariz. 393, 396, 909 P.2d 460, 463 (App. 1995), *quoting Rushing*, 64 Ariz. at 205, 167 P.2d at 398. If Coleman wanted to challenge the validity of the trustee’s deed and, thus, Citibank’s title to the property, he could have done so by filing a separate quiet title action against Citibank.⁵

¶14 Coleman nevertheless argues the trial court should have dismissed the forcible detainer action because “the question of title [wa]s so intertwined with the issue of possession . . . [that] possession [could] not be adjudicated without first determining

⁴Coleman claims the trustee’s deed is not conclusive under § 33-811, because “the invalid recorded transfers” and “the break in the chain of title” negate the presumption of compliance. Coleman did not raise this argument below. We therefore do not address it further. See *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238-39 (arguments raised for first time on appeal untimely and generally deemed waived).

⁵Coleman also failed to raise his objections to the trustee’s sale on the grounds he asserts here by seeking injunctive relief pursuant to Rule 65, Ariz. R. Civ. P., prior to the scheduled date of the sale. A.R.S. § 33-811(C). Failure to seek an injunction resulted in a waiver of such objections. *Id.*

title.” Coleman did not raise this argument in the superior court and we deem it waived. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238-39 (App. 2007). Even if not waived, the argument lacks merit.

¶15 Arizona courts have recognized that in some cases it is impossible to determine the right to actual possession without first resolving other issues that are beyond the scope of forcible detainer proceedings. A forcible detainer action should be dismissed when there is a genuine dispute over “an issue whose resolution is a *prerequisite* to determining which party is entitled to possession.” *Colonial Tri-City*, 179 Ariz. at 433, 880 P.2d at 653. However, in such instances, the issue to be resolved before determining the right to possession usually relates to a dispute about the existence of a contract that could create a right of actual possession of property, or the existence of the type of relationship between the parties that can support a forcible detainer action. *See, e.g., Taylor v. Stanford*, 100 Ariz. 346, 348, 414 P.2d 727, 729 (1966) (purchaser not entitled to bring unlawful detainer action based only on alleged rights under executory contract); *United Effort Plan Trust v. Holm*, 209 Ariz. 347, ¶¶ 22-24, 101 P.3d 641, 645 (App. 2004) (forcible detainer action properly dismissed when parties disputed existence of landlord-tenant relationship and lease agreement and not simply right of actual possession).

¶16 Here, the record does not support Coleman’s contention that he presented such an issue to the trial court. Coleman did not challenge the existence or validity of the underlying promissory note and deed of trust and did not dispute that he had defaulted on his obligations under those documents. As the purchaser of “property [that] ha[d] been

sold through a trustee's sale under a deed of trust," Citibank was entitled to initiate a forcible detainer action to obtain actual possession of the property. A.R.S. § 12-1173.01. And, as we have noted above, issuance of the trustee's deed creates the "presumption of compliance with the requirements of the deed of trust and [the statutes] relating to the exercise of the power of sale and the sale of the trust property." A.R.S. § 33-811(B). The trial court did not err in failing to dismiss Citibank's complaint.

III. Jury Trial

¶17 Last, Coleman contends the trial court wrongfully denied his request for a jury trial because there were material issues of fact for a jury to decide. "[I]f a jury trial has been demanded, the court shall inquire and determine the factual issues to be determined by the jury." RPEA 11(d); *see also* A.R.S. § 12-1176(B) ("If the plaintiff does not request a jury, the defendant may do so on appearing and the request shall be granted."). However, if the court determines "no factual issues exist for the jury to determine, the matter shall proceed to a trial by the judge alone regarding any legal issues or may be disposed of by motion or in accordance with the[] rules, as appropriate." RPEA 11(d).⁶

¶18 At the initial appearance, Coleman asserted there were issues of material fact, arguing that Citibank was not the "holder in due course" or "the real party of

⁶We recognize the statute's mandatory language is at odds with the language of RPEA 11(d) permitting a bench trial and summary disposition without a trial if the trial court determines there are no factual issues for a jury to decide. We believe, however, the approach authorized by Rule 11(d) is analogous to the summary disposition of civil cases authorized under Rule 56, Ariz. R. Civ. P., notwithstanding a party's demand for a jury trial.

interest” and that it lacked standing to foreclose on Coleman’s property. Coleman’s argument went to the merits of Citibank’s title, an issue that, as we already have determined, is not proper in a forcible detainer action. *See Curtis II*, 186 Ariz. at 534, 925 P.2d at 259. Thus, because Coleman’s defense improperly challenged the merits of Citibank’s title, the trial court correctly concluded no “viable issue” existed for a jury to decide. The court did not err in denying Coleman’s request for a jury trial.⁷

Disposition

¶19 For the reasons stated above, we affirm the trial court’s ruling.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

⁷For the first time in his reply brief, Coleman argues that, even if “there were no factual issues,” the trial court “violated [his] procedural due process rights when it rushed to a judgment on the pleadings at an *initial appearance*.” Coleman contends the court should have ordered a bench trial at a later date, to allow Coleman to retain counsel or prepare a defense. Because Coleman did not raise this argument in his opening brief, we do not address it further. *See Romero v. Sw. Ambulance*, 211 Ariz. 200, n.3, 119 P.3d 467, 471 n.3 (App. 2005) (issue raised for first time in reply brief waived on appeal).